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No. 99-1379

IN THE

# Supreme Court of the United States

CIRCUIT CITY STORES, INC.,

*Petitioner,*

*v.*

SAINT CLAIR ADAMS,

*Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF OF *AMICUS CURIAE* SECURITIES INDUSTRY ASSOCIATION IN SUPPORT OF PETITIONER

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## I. PERMISSION TO FILE *AMICUS CURIAE* BRIEF

The Securities Industry Association ("SIA") files this *amicus curiae* brief with the automatic consent of all parties, a copy of which has been lodged herein.

## II. STATEMENT OF INTEREST[1]

The SIA brings together the shared interests of more than 740 securities firms to accomplish common goals. SIA member-firms (including investment banks, broker-dealers, and mutual fund companies) are active in all United States and foreign markets and in all phases of corporate and public finance. The United States securities industry manages the accounts of approximately 50 million investors directly and tens of millions of investors indirectly through corporate, thrift, and pension plans. The industry generates in excess of $300 billion of revenues yearly in the United States.

This decision below precludes employers operating within the geographic area encompassed by the Ninth Circuit Court of Appeals — the states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, and the territories of Guam and the Northern Mariana Islands — from relying on the Federal Arbitration Act ("FAA" or the "Act") in federal court to enforce arbitration agreements with employees who are not directly engaged in the channels of interstate commerce. Currently, employers and employees in all jurisdictions outside the Ninth Circuit — forty-one states and Puerto Rico — may utilize the FAA to enforce arbitration agreements in federal court.

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1. This *amicus curiae* brief filed in support of the Petitioner Circuit City Stores, Inc. was funded solely by the SIA and authored entirely by counsel for the SIA.

Perhaps more so than any other industry in the United States, employers and employees in the financial services industry have relied on arbitration as the process for resolving workplace and customer disputes. Significantly, the vast majority of SIA members have nationwide operations and have implemented or are considering the implementation of bilateral arbitration agreements entered into as a condition of employment. The decision in *Circuit City Stores, Inc. v. Saint Clair Adams*, if affirmed by this Court, would effectively eliminate arbitration as a viable method of employment dispute resolution in the financial services industry because SIA members and their employees would be unable to enforce arbitration agreements pursuant to the FAA, a right which they are currently free to exercise in all courts outside the Ninth Circuit.

In the securities industry, employment claims are almost always intertwined with performance issues that may have regulatory significance. For these reasons, arbitration of employment claims is an important part of how SIA's members conduct business.

The SIA is familiar with the issue presented by this case and believes that it would be helpful to the Court to file this *amicus curiae* brief in order to assist the Court in the resolution of this case. The SIA, therefore, submits this memorandum to demonstrate to the Court why the Ninth Circuit's decision in *Circuit City Stores, Inc.* should be reversed.

## III. SUMMARY OF ARGUMENT

In its 1991 *Gilmer v. Interstate/Johnson Lane Corp.* decision, this Court clearly held that the FAA could be used



to compel employees to arbitrate their Age Discrimination in Employment Act claims. Subsequently, lower courts, including those in all Circuit Courts of Appeals — with the exception of the Ninth Circuit — have made it clear that other statutory discrimination claims, including those arising under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, may be the subject of an arbitration agreement enforceable pursuant to the FAA. Moreover, since *Gilmer*, all Circuit Courts of Appeals — with the exception of the Ninth Circuit — have expressly ruled, or affirmed previous decisions pre-dating *Gilmer*, that the FAA applies to employment contracts, except those covering employees directly engaged in the movement of goods in interstate commerce.

The Ninth Circuit in its decision below in *Circuit City Stores, Inc.* and its previous decision in *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir.), *cert. denied*, 525 U.S. 982, 119 S. Ct. 445 (1998), where it ruled that discrimination claims brought under Title VII would not be compelled to arbitration, has effectively nullified this Court's unqualified endorsement of arbitration as a means of resolving employment disputes expressed in *Gilmer* and destroyed the right of employers and employees to agree, and then enforce their agreement, to resolve employment related disputes in arbitration. As this Court noted in *Gilmer*, "[i]t is by now clear that statutory claims may be subject of an arbitration agreement, enforceable pursuant to the FAA." 500 U.S. 20, 26, 111 S. Ct. 1647, 1652 (1991). To allow the Ninth Circuit's implicit judicial hostility to arbitration of employment disputes to stand is not only contrary to *Gilmer* and the holdings of every other judicial circuit, but directly contradicts the liberal federal policy favoring arbitration agreements expressed by the FAA.

As set forth more fully in the brief of Petitioner, the Ninth Circuit in *Circuit City Stores, Inc.* erroneously interpreted the exclusion contained in section 1 of the FAA.

Moreover, if this Court adopts the Ninth Circuit's position that the FAA does not apply to arbitration agreements contained in employment contracts,[2] *Gilmer's* unequivocal support of arbitration as a dispute resolution mechanism for controversies arising between employer and employee would effectively be rendered dead-letter law and the ability of parties to enforce arbitration agreements under the FAA would be destroyed. The policy implications of such a ruling would be devastating.

First, the court dockets would be further overburdened with employment claims due to the addition of the many employment claims which otherwise would have been resolved in arbitration. Moreover, in one fell swoop, the principal advantages of arbitration, supported by empirical evidence — shorter time to final resolution of disputes and the ability to resolve disputes while repairing or maintaining employment relationships, with some degree of confidentiality and enormous cost savings to both sides — would be vitiated.

Further, the Court's ruling below creates intractable problems unique to the securities industry. Effective January

2. Like the arbitration agreement at issue in *Gilmer*, which was contained in a securities registration application, the arbitration agreement here was not contained in a "contract of employment" as that term is commonly understood. The arbitration agreement which Circuit City Stores, Inc. asked its employees to sign simply established the obligation to arbitrate, but had no further impact on setting terms and conditions of employment.



1, 1999, the Securities and Exchange Commission ("SEC") approved a change to the Form U-4[3] registration agreement whereby registered representatives were no longer required to arbitrate statutory discrimination claims as a condition of working in the securities industry, while at the same time, requiring that non-discrimination employment claims between employees and employees still be arbitrated. However, the change in this rule permitted continued arbitration of both statutory discrimination and other non-discrimination claims via bilateral agreements between employers and their employees. This Court's decision to affirm the Ninth Circuit's ruling in *Circuit City Stores, Inc.* would therefore prevent employers and employees in the financial services and other industries from enforcing their agreements to arbitrate disputes involving statutory employment discrimination claims under the FAA, but still require that non-statutory discrimination claims be arbitrated pursuant to the Form U-4 between the exchange and the employee. This bifurcation caused by *Circuit City Stores, Inc.* nullifies the ability of employers and employees to decide that all employment related claims should be resolved in a single forum, with all of the attendant problems associated with bifurcation of claims.

3. The Form U-4, Uniform Application for Securities Industry Registration, is a uniform standardized form which must be completed by anyone seeking to work as a broker in the securities industry, regardless of the jurisdiction in which they work.

## IV. ARGUMENT

### A. The *Circuit City Stores, Inc.* Decision Was Wrongly Decided and Conflicts With Supreme Court Precedent And All The Other Circuit Courts

Every other circuit court that has addressed the issue presented in this case has disagreed with the Ninth Circuit's holding that the FAA precludes the enforcement of arbitration agreements contained in employment contracts.

Section 2 of the FAA, 9 U.S.C. § 2 (1994 & 2000 Supp.), states that the FAA applies to all "written provision[s] in any maritime transaction or a contract evidencing a transaction involving commerce." Section 1 of the FAA, however, excludes from coverage all "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (1994 & 2000 Supp.). Accordingly, the question which the Court has agreed to review hinges on the interpretation of the clause "any other class of workers engaged in foreign or interstate commerce" that is contained in section 1 of the FAA. All of the circuit courts with the exception of the Ninth Circuit have determined that the exclusionary langua[illegible] present in section 1 of the FAA is to be narrowly construed to workers literally involved in interstate commerce. *See, e.g.*, *Dickstein v. duPont*, 443 F.2d 783, 785 (1st Cir. 1971); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972); *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222, 227 (3d Cir.), *cert. denied*, 522 U.S. 915, 118 S. Ct. 299 (1997); *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 274 (4th Cir. 1997); *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 748 (5th Cir. 1996); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 600-01 (6th Cir. 1995); *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 363-64 (7th Cir.), *cert. denied*, 120 S. Ct. 44 (1999); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 835 (8th Cir. 1997); *McWilliams v. Logicon, Inc.*, 143 F.3d 573, 576 (10th Cir. 1998); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1060-61 (11th Cir. 1998); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1472 (D.C. Cir. 1997).



A leading case supporting the position which all of the Circuit Courts of Appeals have adopted, with the exception of the Ninth Circuit, is *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064 (2d Cir. 1972). In 1971, Erving left the University of Massachusetts and signed a contract to play basketball for the Virginia Squires of the American Basketball Association. *See id.* at 1066. Erving's contract provided that any dispute would be settled by arbitration. *Id.* at 1066 n.1. In April of 1972, Erving signed a contract to play with the National Basketball Association's Atlanta Hawks. *Id.* at 1066. The Squires sought to enforce Erving's contract through arbitration. Erving sought to avoid arbitration and have the court set aside his original contract. In his attempt to avoid arbitration, Erving argued that his contract fell under the FAA's section 1 exclusion.

In rejecting this argument, the court set forth in definitive terms the limits of the exclusion: "the exclusionary clause in Section 1 applied only to those actually in the transportation industry. Erving clearly is not involved in the transportation industry." The court therefore affirmed an order staying the player's action to rescind his contract pending arbitration. *Id.* at 1069. In reaching its decision, the court said the following which should bear directly on this Court's consideration of the issue presented here: "[i]n light

of the strong national policy in favor of arbitration as a means of settling private disputes, we see no reason to give an expansive interpretation to the exclusionary language of Section 1." *Id.*

Indeed, if this Court were to affirm the Ninth Circuit's ruling, and effectively eviscerate the right of parties to contract freely to arbitrate employment disputes, the decision would undermine the purposes of the FAA, which expresses a strong federal policy favoring arbitration. That policy has been articulated at all levels of the federal judicial system, including repeated pronouncements which this Court has issued. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28-29, 111 S. Ct. 1647, 1653 (1991); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637, 105 S. Ct. 3346, 3358 (1985); *Southland Corp. v. Keating*, 465 U.S. 1, 16, 104 S. Ct. 852, 861 (1984); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401-02, 87 S. Ct. 1801, 1805 (1967). In fact, the stated purpose of the FAA — originally titled the United States Arbitration Act — is "[t]o make valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts." United States Arbitration Act, ch. 213, 43 Stat. 883 (1925). Accordingly, an agreement between an employer and employee to arbitrate all employment claims not only impacts the individual contractual interests of the parties, but also implicates the federal policy favoring arbitration. *See, e.g., Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S. Ct. 927, 941 (1983) ("the Courts of Appeals have . . . consistently concluded that questions of arbitrability must be addressed with a healthy regard for the federal policy of arbitration").



Therefore, contrary to the Ninth Circuit's holding, the language of section 1 of the FAA and the reference to "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" suggests that Congress intended to refer to workers engaged in commerce in the same way that seamen and railroad workers are. Indeed, in *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 600-01 (6th Cir. 1995), the court, after a thorough analysis of the treatment of this issue by the other circuit courts of appeals, came to this very conclusion which should be adopted by this Court:

> [T]he exclusionary clause of § 1 of the Arbitration Act should be narrowly construed to apply to employment contracts of seamen, railroad workers, and any other class of workers actually engaged in the movement of goods in interstate commerce in the same way that seamen and railroad workers are. We believe this interpretation comports with the actual language of the statute and the apparent intent of the Congress which enacted it. The meaning of the phrase 'workers engaged in foreign or interstate commerce' is illustrated by the context in which it is used, particularly the two specific examples given, seamen and railroad employees, those being two classes of employees engaged in the movement of goods in commerce.

### B. The Ninth Circuit's Decisions in *Circuit City Stores, Inc.* and Previously in *Duffield v. Robertson Stephens & Co.* Nullify This Court's *Gilmer* Decision And Are Calculated To Eliminate Arbitration As A Resolution Mechanism For Employment Disputes

In two decisions handed down within one year of each other, the Ninth Circuit has effectively nullified this Court's *Gilmer* decision and unjustifiably destroyed the right of employers and employees to agree to resolve all of their disputes in arbitration. First, in *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir.), *cert. denied*, 525 U.S. 982, 119 S. Ct. 445 (1998), the Ninth Circuit, again contrary to every other circuit court to have addressed the issue, held that the Civil Rights Act of 1991 (the "1991 Act") prohibits the enforcement of pre-dispute arbitration agreements governing statutory claims of employment discrimination. To compound the Ninth Circuit's isolation on this issue, the decision in *Circuit City Stores, Inc.* now removes other non-discrimination claims from arbitration that survived *Duffield's* prohibitions, namely common-law and non-statutory employment claims. The result is the evisceration of this Court's long-standing commitment to the federal policy favoring arbitration and an unprecedented assault on the long-standing method of dispute resolutions for claims arising between financial services industry employees and their employers, as well as other industries that have embraced arbitration to resolve their employment disputes. *See, e.g., Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226, 107 S. Ct. 2332, 2337 (1985).

In *Duffield*, the Ninth Circuit largely ignored this Court's endorsement of arbitration as a method of resolving statutory discrimination claims in *Gilmer* and found that the legislative



history to the 1991 Civil Rights Act established that Title VII discrimination claims could not be compelled to arbitration by a federal court. Similarly, in *Circuit City Stores, Inc.* and its predecessor, *Craft v. Campbell Soup Co.*, 177 F.3d 1083 (9th Cir. 1999), the Ninth Circuit again contorts the plain meaning of statutory language to hold that the FAA excludes all employment contracts from its jurisdiction.

As is shown below, if employers and employees were unable to enforce arbitration agreements under the FAA, overburdened courts would be deluged with additional employment lawsuits. Moreover, the empirical evidence demonstrates, contrary to the Ninth Circuit's implicit hostility towards the process, that arbitration offers many advantages to both employers and employees.

#### 1. *The Effects of this Court's Decision to Affirm the Ninth Circuit Would be Overwhelming*

This Court's decision to affirm the Ninth Circuit's latest assault on arbitration of employment disputes would further overburden the courts with thousands of employment disputes. This Court in *Gilmer* recognized that arbitration "can further broader social purposes." 500 U.S. at 28, 111 S. Ct. at 1653. Indeed, this Court's long-standing support of arbitration as a matter of federal policy has as one of its bases the desire have alternative dispute resolution mechanisms ease the burden on an overcrowded court system. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S. Ct. 927, 941 (1983).

In fact, since this Court's 1991 *Gilmer* decision, more and more employers have implemented arbitration programs.

A 1994 General Accounting Office ("GAO") survey of private employers found that approximately 10% of employers utilize arbitration to resolve employment disputes. U.S. General Accounting Office, *Employment Discrimination: Most Private-Sector Employers Use Alternative Dispute Resolution*, GAO/HEHS-95-150 at 7 (1995). By 1997, the GAO estimated that the figure had almost doubled to 19%. U.S. General Accounting Office, *Alternative Dispute Resolution: Employers' Experiences with ADR in the Workplace*, GAO/GGD-97-157 at 2 (1997) ("*ADR in the Workplace*"). In the securities industry alone, some 32% of the employees of the largest 50 securities firms in the United States had agreed to arbitrate all claims arising out of their employment by virtue of signing a Form U-4. U.S. General Accounting Office, *Employment Discrimination: How Registered Representatives Fare in Discrimination Disputes*, GAO/HEHS-94-17 at 3 (1994). Some of those firms also require non-registered employees to sign individual arbitration agreements as a condition of employment.

Accordingly, if this Court were to accept the Ninth Circuit's latest blow against the arbitration of employment disputes in *Circuit City Stores, Inc.*, the result would be a dramatic increase in the number of employment claims that are brought in court. For example, the Administrative Office of the United States Courts estimates that the number of employment cases filed annually in the federal courts increased approximately 55% from 1992 to 1997. Administrative Office of the United States, *Judicial Business of the United States Courts 1997* at Table C-2. Moreover, approximately 10% of the docket of the federal courts today already involves employment issues. Leonidas Ralph Mecham, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, *Report of the Director* (Administrative Office of the United



States Courts, Sept. 30, 1999) (statistic compiled from Table C-2, reporting total employment civil rights actions and total cases filed in the United States District Courts during the twelve month period ending September 30, 1999).

2. *Empirical Evidence Establishes That Arbitration Provides A Fair and Impartial Dispute Resolution Forum*

Contrary to the Ninth Circuit's decided aversion to arbitration of employment disputes, the empirical evidence reveals that arbitration provides employees and employers many benefits. As one observer has noted:

> [A]lternative employment dispute resolution has the potential to be more cooperative or less adversarial than litigating employment disputes and, still further, employment relationships between companies and aggrieved employees are potentially more likely to continue or be re-established under alternative dispute resolution systems than under litigation.

*See* David Lewin, *Dispute Resolution in Non Union Organizations: Key Empirical Findings*, Alternative Dispute Resolution in the Employment Arena, Proceedings, 53rd Annual NYU Conference on Labor (S. Estreicher, Editor, forthcoming 2000).

Other empirical evidence of the advantages of arbitration of employment disputes compared to litigation of such disputes are revealed in another recent study prepared by SIA's counsel prior to his retention on this matter. This study included: (i) a review of outcomes for all employment

discrimination cases filed and resolved in the United States District Court for the Southern District of New York for the period April 1, 1997 to November 30, 1999, and (ii) a survey of securities industry arbitration awards based on available National Association of Securities Dealers ("NASD") and New York Stock Exchange ("NYSE") arbitration awards involving discrimination claims during the same time period. *See* Michael Delikat, *An Empirical Study of Dispute Resolution Mechanisms For Employment Disputes: Do Plaintiffs Better Vindicate Their Rights in Litigation?*, Alternative Dispute Resolution in the Employment Arena, Proceedings, 53rd Annual NYU Conference on Labor (S. Estreicher, Editor, forthcoming 2000). This study found that employee-claimants in arbitration before the NASD and NYSE prevailed in 48% of the cases filed, yet only 30% of all employees filing discrimination cases in the United States District Court for the Southern District of New York prevailed in litigation. Additionally, this study found that it took approximately 50% longer to resolve employment disputes in court compared to arbitration (even though the study only tracked outcomes through verdict, not post-verdict modifications or appeals which would further lengthen the time for complete judicial resolution) and that claimants incurred almost 50% more attorneys' fees in pursuing all claims in court compared to arbitration. *See id.*

Further, a recently issued study which compared the advantages of arbitration compared to litigation, conducted by Lewis Maltby, the Director of the American Civil Liberties Union's National Task force on Civil Liberties in the Workplace, confirmed the results of the study performed by SIA's counsel. Mr. Maltby's study revealed that



> [t]he entire class of employees who take their disputes to court collectively receive 10.4 percent of their total demand. Employees who take their disputes to arbitration receive 18 percent of their total demand. Employees who take their dispute to arbitration receive almost twice as much of their demands as the employees who take their dispute to court . . . [F]ar more employees win in arbitration than in court, and, overall, employees who take their disputes to arbitration collect more than those who go to court.

*See* Lewis Maltby, Employment Arbitration: Is it Really Second Class Justice?, 6 No. 1 DISP. RESOL. MAG. 23, 23-24 (1999).

Accordingly, the studies — conducted by individuals representing the interests of both employees and employers — reveal the following about arbitration: (1) employees prevail more frequently in arbitration than in federal court and receive a higher percentage of their original demand in arbitration than they do in federal court; (2) employees alleging discrimination claims see their claims resolved substantially faster in arbitration than in federal court; (3) transactional costs in the form of attorneys' fees are substantially lower in arbitration; and (4) victims of discrimination are more likely to have the opportunity to present their claim to the factfinder in arbitration than in litigation.[4] In short, despite the Ninth Circuit's implicit

4. By contrast to litigation, the rules of the various institutions which hear arbitration claims, *e.g.*, the NYSE, the NASD, the AAA, do not explicitly provide for motions for summary judgment or (Cont'd)

blacklisting of arbitration as being unfair to employees, arbitration resolves disputes fairly, quickly and efficiently.

In sum, affirming the Ninth Circuit's decision in *Circuit City Stores, Inc.* would ignore the many benefits of arbitration established by empirical studies and the many years of fair dispute resolution that financial service industry employers and employees have enjoyed. In the absence of any statutory support or policy reason to eviscerate this system, this Court should not sanction this obvious effort by the Ninth Circuit to destroy arbitration of employment disputes.

### C. The Ninth Circuit's Decision in *Circuit City Stores, Inc.* Creates Troubling Issues Peculiar to SIA Members

The Ninth Circuit's decision in *Circuit City Stores, Inc.* has profound consequences for SIA members for another reason. Effective January 1, 1999, the NASD and NYSE ended the long-standing requirement in the securities industry, contained in the Form U-4, that broker-dealer employees arbitrate statutory claims of employment discrimination against their member firms. In announcing the adoption of the new rule, SEC Commissioner Isaac C. Hunt, Jr. stated that the rule change "will not address all the

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(Cont'd)
dismissal and, in actual practice, pre-hearing dismissals on substantive motions are extremely rare. This means that some claims which otherwise would have been dismissed in court on legal grounds are presented to arbitrators, allowing the claimant an opportunity which he or she otherwise may not have — the opportunity to attempt to persuade the arbitrators that "fairness" dictates that the claimant be granted relief, even where strict legal elements may be lacking.



issues," because although the NASD (and NYSE) are now taken out of the business of enforcing industry-wide pre-dispute arbitration agreements relating to statutory employment claims, the rule change does not prevent any brokerage firm from including pre-dispute arbitration agreements in individual contracts. *See, e.g., Arbitration: SEC approves NASD Proposal To Find Mandatory Arbitration of Bias Claims*, Daily Lab. Rep. (BNA) No. 121, at A-10 (June 24, 1998). The consequence of this rule change — that SIA member firms, all of whom belong to at least one of the self-regulatory organizations, would still be able to continue existing or enter into "private" pre-dispute arbitration agreements with their employees — moderated opposition from securities industry employers to the adoption of the rule. Indeed, in providing its support to the rule change, and a one year phase-in period from the time the SEC approved the rule until its effective date, the SIA expressly noted that "employers and firms need this time to consider what agreements they may wish to enter into directly with each other with regard to dispute resolution."

Accordingly, in assenting to the SEC's decision to revise radically the securities industry practice with respect to arbitration of statutory discrimination claims, SIA members concluded that they would have the option of continuing arbitration, but would be required to do so through private, bilateral agreements they reach with their employees. This shift — away from the certainty that *Gilmer* had provided in its holding that arbitration agreements between employers and regulatory or licensing bodies are enforceable to compel arbitration of statutory employment discrimination claims through use of the FAA — was only palatable to securities

industry employers if the courts had the power under the FAA to enforce the private, bilateral arbitration agreements that could, and for many SIA members, have replaced the arbitration clause contained in the Form U-4.

However, the decision in *Circuit City Stores, Inc.* now nullifies the option of allowing employers and employees to enter into bilateral agreements to resolve all of their employment disputes in a single arbitral forum — an option specifically sanctioned by the SEC. If *Circuit City Stores, Inc.* is affirmed, the ability to enforce these private arbitration agreements in the securities industry under the FAA would be largely a dead letter — as would this Court's decision in *Gilmer*. Moreover, because the Form U-4 still mandates that non-discrimination claims between registered representatives and their employers be arbitrated before the NASD or NYSE, those cases where both discrimination and non-discrimination claims are asserted will be bifurcated, even where the parties have entered into private bilateral agreements to resolve all claims in a single forum. As such, *Circuit City Stores, Inc.* poses unique and intractable problems for alternative dispute resolution of employment claims for security industry members.



## V. CONCLUSION

For the foregoing reasons, the SIA respectfully asks this Court to reverse the Ninth Circuit's decision in *Circuit City Stores, Inc. v. Saint Clair Adams*.

Respectfully submitted,

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